Supreme Court, U.S.
FILED

No. 06-1388 APR 16 2007

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MAHENDARA PRATAP GUPTA, CARDINAL CARE INC., MARSHAL MEDICAL SERVICES, INC., ATLANTIC HEALTH CARE SERVICES, INC., WEST COAST HEALTHCARE SERVICES, INC., and TREASURE COAST HEALTH CARE SERVICES, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari From The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' PETITION FOR WRIT OF CERTIORARI

NEAL R. SONNETT, ESQ.
NEAL R. SONNETT, P.A.
2 South Biscayne Blvd., Suite 2600
Miami, Florida 33131
Telephone: 305-358-2000
Facsimile: 305-358-1233
Email: nrs@sonnett.com

GENE B. MCCLURE, ESQ.
MCCLURE & MCMORRIES, P.C.
127 Peachtree Street, Suite 440
Atlanta, Georgia 30303
Telephone: 404-688-5000
Facsimile: 404-688-1333
Email: lawmcclure@aol.com

SCOTT A. COLE, ESQ.
Counsel of Record
THOMAS E. SCOTT, ESQ.
COLE, SCOTT & KISSANE, P.A.
Pacific National Bank Building
1390 Brickell Avenue, Third Floor
Miami, Florida 33131
Telephone: 305-350-5300
Facsimile: 305-373-2294
Email: scott.cole@csklegal.com

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether Petitioners' due process rights were violated wherein the Government prosecuted its criminal case relying on its interpretation of an ambiguous regulation, 42 C.F.R. § 413.17, that failed to give the Petitioners notice as to what constituted a "related party" when the Petitioners responded to a vague, misleading, and ungrammatical question on a Medicare reimbursement form?

CORPORATE DISCLOSURE STATEMENT

Petitioners file this Corporate Disclosure Statement as required by United States Supreme Court Rules 14 and 29.6. The corporations listed below do not have a parent or publicly held company owning 10% or more of the corporation's stock.

Atlantic Health Care Services, Inc.

Cardinal Care, Inc.

Marshall Medical Services, Inc.

Treasure Coast Health Care Services, Inc.

West Coast Healthcare Services, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
BASIS FOR SUPREME COURT JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	3
I. Introduction	3
II. The Charges Against Petitioners	4
III. Trial	5
A. Background Facts	5
B. Related Party Regulations and HCFA Form: Question 4(a)	6
C. Montana Transactions	8
D. Relationship Between Gupta, Corporate Defendants and Allegheny	9
IV. Verdict	10
V. Appeal From Convictions	11
REASONS FOR GRANTING PETITION	11
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Biloxi Regional Medical Center v. Bowen, 835 F.2d 345 (D.C. Cir. 1987) 18, 19

Chevron U.S.A. Inc. v. Natural Def. Counsel, Inc., 467 U.S. 837 (1984) 12

Dunn v. United States, 442 U.S. 100 (1979) 21

Porter v. Household Corp. of Columbus, 385 F.Supp. 336 (S.D.Ohio 1974) 20

Stanton v. Preis, 138 Cal. App. 2d 104, 291 P.2d 118 (Dist. Ct. App. Cal. 1956) 20

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 13

United States v. Alemany Rivera, 781 F.2d 229 (1st Cir. 1985) 17, 20, 21

United States v. Calhoon, 97 F.3d 518 (11th Cir. 1996) 17, 20

United States v. Larson, 796 F.2d 244 (8th Cir. 1986) 21

United States v. McGoff, 831 F.2d 1071 (D.C. Cir. 1987) 13

United States v. Whiteside, 285 F.3d 1345 (11th Cir. 2002) 13

United States v. Woodley, 9 F.3d 774 (9th Cir. 1993) 17, 20, 21

Virginia Trust Co. v. Evans, 193 Va. 425, 69 S.E. 2d 409 (Va. 1952) 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATION

42 C.F.R. § 413.17 ..... 2, 6, 9, 16, 21

18 U.S.C. § 286 4

28 U.S.C. § 1254 1

28 U.S.C. § 2101 1

ADMINISTRATIVE DECISION

Tennessee Nursing Medical Services v. Blue Cross and Blue Shield (Hearing Decision No. 93-D100, September 28, 1993) 9, 19

OTHER MATERIALS

Provider Reimbursement Manual § 1000 ..... 8, 16

Restatement, Property § 3 20

Restatement, Second, Agency § 6 20

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 463 F.3d 1182 (11th Cir. September 5, 2006), and is reproduced in the Appendix accompanying the Petition for Writ of Certiorari in this case at 1.[1]

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgment on September 5, 2006. App. 1. Petitioners seek review of that judgment on a writ of certiorari.

On September 26, 2006, Petitioners timely filed a petition for rehearing *en banc* in the Court of Appeals.[2] On January 17, 2007, the Court of Appeals filed an order denying both the petition for rehearing and the petition for rehearing *en banc*. App. 48. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

[1] Throughout this Petition, "App." refers to the Appendix accompanying the Petition for Writ of Certiorari filed with the Court.

[2] According to 11th Cir. R. 35-5, "a petition for rehearing *en banc* will also be treated as petition for rehearing before the original panel."

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED IN THE CASE

The important federal issue presented in this case stems from the denial of Petitioners' due process rights afforded by the United States Constitution Fifth Amendment, which provides no defendant will "be deprived of life, liberty, or property, without due process of law."

Petitioners' due process rights were violated by allowing the jury to rely on the government's interpretation of regulation 42 C.F.R. § 413.17 in determining whether the Petitioners committed fraud in a criminal context. 42 C.F.R. § 413.17 in pertinent part states as follows:[3]

> (a) Principle. Expect as provided in paragraph (d) of this section costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization. However, such cost must not exceed the price of comparable services, facilities, or supplies that could be purchased elsewhere.
>
> (b) Definitions –
>
> > (1) Related to provider. Related to the provider means that the provider to a significant extent is associated or affiliated with or has control of or is controlled by the organization furnishing the services, facilities, or supplies.

[3] The entire text of 42 C.F.R. § 413.17 is found at App. 50.

> (2) Common ownership. Common ownership exists if an individual or individuals possess significant ownership or equity in the provider and the institution or organization serving the provider.
>
> (3) Control. Control exists if an individual or an organization has the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization or institution.

The Eleventh Circuit Court of Appeals' ruling conflicts and departs from the accepted and usual course of judicial proceedings and calls for an exercise of this Court's supervisory power.

STATEMENT OF THE CASE

I. Introduction

Petitioner, Defendant, Mahendra Pratap Gupta ("Gupta"), a healthcare consultant and owner of private healthcare agencies, appeals from a criminal conviction for conspiracy to submit false claims to the United States and two convictions for mail fraud. App. 2.

Petitioners, Cardinal Care, Inc. ("Cardinal"), Marshall Medical Services, Inc. ("Marshall"), Atlantic Health Care Services, Inc. ("Atlantic"), West Coast Healthcare Services, Inc. ("West Coast"), Treasure Coast Health Care Services, Inc. ("Treasure Coast") (hereinafter collectively "Corporate Defendants"), operating as home health care agencies, appeal their convictions for conspiracy to submit false cost reports to Medicare. App. 2.

Allegheny Management Company ("Allegheny"), a health care consulting company, was also convicted, but did not appeal. App. 2 and 5. Specifically, Allegheny provided business consulting to the aforementioned home healthcare agencies by preparing bills, payroll, and Medicare cost reports, and supplying accounting, computer and clerical services. App. 5.

Edward Quinlan ("Quinlan"), owner, sole stockholder and president of Allegheny, was acquitted of all charges by the jury. App. 6.

Kuldeep K. Hajela ("Hajela"), Allegheny's chief of operations was acquitted by the district court when it granted Hajela's motion for judgment of acquittal at the close of the government's case. App. 6.

II. The Charges Against Petitioners

This case began as a sixteen-count indictment against fifteen defendants in the District of Montana. It was later transferred to the Southern District of Florida. App. 5-6. The indictment charged the Defendants with defrauding Medicare by violating the "related party" regulation by use of false claims to conceal the relationship between the various Defendants.[4] App. 5-6. The government alleged

---

[4] 18 U.S.C. § 286 prohibits submission of false claims to the United States:

> Whoever enters into an agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.

that Gupta created Allegheny to collect an additional layer of reimbursable costs from the Medicare program and increase the Corporate Defendants' reimbursable costs closer to Medicare's "costs caps." App. 7. However, there was no evidence introduced by the government that Gupta created or owned Allegheny and the government conceded this fact. App. 14. Therefore, at trial the government attempted to prove that Gupta controlled Allegheny by relying on a vague Medicare "related party" regulation. App. 14.

The district court severed the trial of four defendants (Vijay Kumar Gupta, and his three companies, American Home, Franklin and Greenfield) and, subsequently, the government dismissed the charges against those four defendants. App. 6. The district court also dismissed thirteen of the sixteen counts in the indictment. App. 6.

III. Trial

The case went to trial on October 25, 1999 before Judge Kenneth Ryskamp against the remaining Defendants (Gupta, Quinlan, Hajela, Allegheny, Cardinal, Marshall, Atlantic, West Coast and Treasure Coast) on the three remaining counts (one count of conspiracy to submit a false claim and two counts of mail fraud). App. 6.

A. Background Facts

In 1991, Allegheny began providing administrative services to the Corporate Defendants including, but not limited to, accounting, billing Medicare cost reporting and general business management. App. 7. Pursuant to the Medicare Program, the Corporate Defendants were

permitted to be reimbursed for the costs of hiring consultants, such as Allegheny, to provide administrative services.[5] App. 7. If the consultant is not related to the home health agency, Medicare will reimburse the Corporate Defendants for the amount of the consulting contract. App. 7. If a relationship of ownership or control exists, Medicare reimburses the home health agency at the cost to the related supplier. App. 7.

Prior to using an outsourced management company to furnish billing and accounting functions to home health providers, Gupta obtained the advice of competent professionals in the highly complex field of Medicare regulations. App. 18. Gupta hired an accountant, Frank Blohm, who worked very closely with him and devoted a great deal of time to learning the complex Medicare regulations including, but not limited to, the "related party" Medicare regulation. App. 18.

B. Related Party Regulations and HCFA Form: Question 4(a)

The Medicare regulations applicable to the Defendants' conduct limit reimbursement for services provided by a "related" organization to the supplier's actual cost instead of the amount paid by the provider. App. 3. The controlling regulation, 42 C.F.R. § 413.17, entitled "Cost to Related Organizations," provides:

---

[5] During the 1990's, outsourcing accounting and other tasks was becoming more common among home health care agencies. Many home health care agencies outsourced accounting, billing and computer services to service companies that could perform these tasks more efficiently. Outsourcing these tasks allowed home health care agencies to reduce costs and focus on patient care.

(a) Principle. Expect as provided in paragraph (d) of this section costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization. However, such ost must not exceed the price of comparable services, facilities, or supplies that could be purchased elsewhere.

(b) Definitions –

(1) Related to provider. Related to the provider means that the provider to a significant extent is associated or affiliated with or has control of or is controlled by the organization furnishing the services, facilities, or supplies.

(2) Common ownership. Common ownership exists if an individual or individuals possess significant ownership or equity in the provider and the institution or organization serving the provider.

(3) Control. Control exists if an individual or an organization has the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization or institution. App. 3-4, 50.

The Provider Reimbursement Manual, published by the Health Care Financing Administration (HCFA), explains the purpose of the "related party" regulation:

(1) to avoid the payment of profit factor to the provider through the related organization (whether related by common ownership or control), and (2) to avoid payment of artificially inflated costs which may be generated

> from less than arm's length bargaining. Provider Reimbursement Manual § 1000. App. 4.

In submitting claims for reimbursement to Medicare at year end, the provider is required to complete Question 4(a) of HCFA Form 339, the "Provider Cost Report Reimbursement Questionnaire," in order for Medicare providers to disclose whether they had received products or services from a "related party." App. 4. Question 4(a) states the following:

> 4. The provider, members of the board of directors, officers, medical staff or key employees are associated in the following business transactions.
>
> a. Involved with related organizations, management contracts and services under arrangements as owners (stockholders), management, by family relationship, or any other similar type relationship. App. 4-5.

However, Question 4(a) does not track the "related party" regulation's language and does not mention the concept of "control." App. 5.

C. Montana Transactions

The government concentrated on the activities occurring in Montana to establish a "related-party" relationship between Gupta, the Corporate Defendants and Allegheny.[6]

---

[6] The government focused on Gupta's dealing with the health care agency, Independent Home Health Care, Inc. ("IHHC"), who was not a party at trial, to show that Gupta failed to report to Medicare that

(Continued on following page)

App. 8. The government argued that Gupta assisted friends to purchase health care agencies in Montana, which in turn contracted with Allegheny and Gupta for consulting services.[7] App. 8. These agencies were not the subject of this or any criminal charges.

D. Relationship Between Gupta, Corporate Defendants and Allegheny

The government conceded that Gupta did not own Allegheny. App. 14. Instead, the government focused on issue of control to establish that Gupta and the Corporate Defendants were related to Allegheny. App. 14.

From 1991 to 1997, Corporate Defendants claimed reimbursement for Allegheny's consulting services and at the end of each fiscal year, each Corporate Defendant submitted HCFA Form 339 stating that were no "related-party" transactions in that there was no relationship between Gupta and the owners of the Corporate Defendants and Allegheny. App. 11-12.

At trial, Gupta argued that he was at worst demanding of Allegheny, but he was not a "related party" since he did not own or have any legal control of Allegheny. App. 17. Additionally, the Petitioners argued that there was no

---

Gupta and Allegheny had "related party" transactions. App. 8. IHHC was sold to St. Peter's Hospital in 1994. App. 10. Curiously, the evidence presented at trial indicated that after St. Peter's Hospital took over for IHHC, it was reimbursed by Medicare at a much higher rate for the services that had been previously provided by IHHC. App. 30.

[7] 42 C.F.R. § 413.17(c)(1) recognizes that financial assistance is not the same as control. *See also Tennessee Nursing Medical Services, Inc. v. Blue Cross and Blue Shield Association,* PRRB Dec. No. 93-D100, September 28, 1993, discussed *infra*.

agreement between Quinlan and Gupta or anyone else to defraud Medicare. This fact is supported by the absence of any money going from Allegheny to Gupta or any other Defendants, which the government witness affirmed. App. 19.

IV. Verdict

On November 5, 1999, the jury returned guilty verdicts against Gupta, the Corporate Defendants and Allegheny. App. 6. Notably, Quinlan, the owner and sole stockholder and president of Allegheny, was acquitted of all charges by the jury. Allegheny's chief of operations, Hajela, was also acquitted by the court by granting Hajela's pre-verdict motion for judgement of acquittal. App. 6.

On October 16, 2002, the district court granted post-verdict judgments of acquittal in favor of Gupta and the Corporate Defendants pursuant to Rule 29 and 33 of the Federal Rules of Criminal Procedure. App. 6. The government appealed the acquittals and the Eleventh Circuit vacated the acquittals as untimely and remanded for sentencing. App. 7.

Prior to sentencing, the district court considered extensive expert reports filed by the parties on the issue of loss and held that there was no loss to the government. App. 40-47. As a result, Gupta was sentenced to three years' probation for each conviction to run concurrently and fined $10,000.00.[8] App. 2. Marshal, Cardinal, West

---

[8] The district court stated the following regarding his reasoning in imposing the sentences:

> As I indicated at a prior time, it's amazing to me that somebody could be convicted of a felony based upon a bureaucratic regulation. Now, I know you say, well, he made a false

(Continued on following page)

Coast, Treasure Coast and Atlantic were sentenced to three years' probation. App. 2. Marshal and Cardinal were fined $1,000.00 each, but the remaining Defendants, West Coast, Treasure Coast and Atlantic, were not fined because they were no longer in business. App. 2. Final Judgments of Conviction were entered on November 9, 2004. App. 34-47.

V. Appeal from Convictions

Defendants timely filed their notice of appeal of their convictions on November 15, 2004. App. 2. The government filed a notice of cross-appeal of the sentences. App. 2. On September 5, 2006, the Eleventh Circuit Court affirmed the convictions of Gupta and the five corporate Defendants, but it vacated the sentences and remanded for re-sentencing with respect to Gupta, Marshal and Cardinal. App. 1-2.

REASONS FOR GRANTING PETITION

The lower courts violated Petitioners' due process rights by imposing criminal penalties for conduct which the Petitioners had no notice was sanctionable. The Petitioners were criminally penalized based upon the government's interpretation of an ambiguous regulation concerning Medicare reimbursement for administrative

---

statement and/or mail fraud or something. But these regulations were so poorly drawn and so obscure that I don't see how within either – how a jury could find an intent to defraud beyond a reasonable doubt. So these are the factors that I'm relying upon in imposing sentence. App. 26.

costs of health care agencies. The Petitioners completed the Medicare paperwork by checking a box that affirmed the healthcare agencies (Cardinal, Marshall, Treasure Coast, West Coast, and Atlantic) were not related to the consultant (Allegheny). Based on Petitioners' interpretation of the regulation, they correctly submitted their claim forms to Medicare and there is no evidence that they knowingly violated the regulations.

In fact, this case involved the first and only Medicare criminal prosecution using a "control" theory of relatedness in which, as acknowledged by the prosecution, no profits were obtained by the defendant and as found by the district court, no losses were sustained by the government. The government contended that Allegheny was a "related party" to Gupta and the home health care agencies, and, therefore, the Corporate Defendants could not be reimbursed for any expenses other than actual costs incurred by Allegheny. As discussed below, the "related party" regulations have been universally recognized to be ambiguous, undefined, and difficult to apply, and had never before been utilized as a basis for imposing criminal liability solely on the basis of "control" of the "related party." Moreover, after the Petitioners were indicted, the medicare program eliminated the use of the "related party" regulation for cost reimbursement of administrative services because of the confusion the "related party" regulation created when it was applied in cost reimbursement situations. App. 40.

An agency's interpretation of ambiguous statutory language is entitled to deference because of the agency's delegated authority to administer the statute. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The same consideration underlies deference to an

agency's interpretation of its own regulation. *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504 (1994). However, the courts have questioned whether such deference is appropriate in the criminal context. *United States v. McGoff,* 831 F.2d 1071, 1077 (D.C. Cir. 1987). Conduct that is treated ambiguously by a regulation should not be criminalized. *United States v. Whiteside,* 285 F.3d 1345, 1352 (11th Cir. 2002) (regulation that reasonably "can be interpreted different ways" as to charged conduct does not justify criminal convictions).

The present case illuminates compelling reasons why the deference afforded to agencies should be limited, especially in the criminal context. In addition to the government's unsupported interpretation of the applicable statute and regulation, the fact that the concept upon which the convictions are premised has been eliminated because of problems in defining a "related party" in an age where corporations merge and ownership changes are frequent is particularly troubling.

The government's primary theory in this case was that Gupta created a management consulting firm, Allegheny, for the purpose of charging the Corporate Defendants with reimbursable consulting fees. The government supported its argument that they were a "related party" because Gupta controlled Allegheny. This control argument, however, was not premised upon any legal authority that Gupta had as an owner, officer, or employee of Allegheny. Nor was it based on the contract between Allegheny and the home health agencies. Neither Quinlan nor any officer of Allegheny was employed by Gupta or by the Corporate Defendants. Just as plainly, none of Gupta's family members are alleged to have held stock or corporate positions in Allegheny.

A review of the applicable Medicare reporting form, HCFA Form 339 Question 4(a), used to disclose related party transactions, which the government claimed was improperly completed by Corporate Defendants, did not appear to apply to Allegheny by reason of its explanation of the "related party" regulation.[9] The form, instead, asks only if the provider or its officials are "associated" by ownership, management, family relationship, or "any other similar type relationship." Further compounding the ambiguities, Question 4(a) requires that Medicare providers answer "yes" if they receive services from a related organization, yet this "question" does not define the term "related organization." In a similar manner, the phrase "any other similar type of relationship" is not explained or defined in Form 339. This phrase could reasonably be interpreted as referring to a relationship similar to an owner, manager, or a family member because those were the types of relationships that preceded this term. Lastly, undefined terms like "associated" and "involved with" can have a number of different meanings. Accordingly, the convictions cannot stand without proof beyond a reasonable doubt that the answer to Question 4(a) was knowingly and intentionally false.

---

[9] Question 4(a) states the following:

> 4. The provider, members of the board of directors, officers, medical staff or key employees are associated in the following business transactions.
>
> a. Involved with related organizations, management contracts and services under arrangements as owners (stockholders), management, by family relationship, or any other similar type relationship. App. 4-5.

As matters developed after the time of the charged conduct, the problems created by this ambiguous, inconsistent criteria were resolved by completely eliminating the regulatory "related party" provision for cost reimbursement. Interestingly, the provision was replaced with provisions that expressly permit reimbursements for the same "related party" relationship that was the subject of this criminal indictment.[10] Thus, Petitioners alleged conduct – improperly responding to Question 4(a) on Form 339 – is no longer criminal and there will be no further prosecutions under the "related party" regulation.

At most, the evidence showed that Gupta may have been a "controlling" individual, like any business' important client.[11] However this is not the type of "control" contemplated by the "related party" regulation. It is especially inconsistent for the government to prosecute

---

[10] See D.E. 295 at 9-10. As observed by Judge Ryskamp at the sentencing hearing on November 5, 2004:

> [T]here were two times U.S. Attorneys declined to prosecute this matter. There [sic] were regulations that were so vague that even the government recognized they were vague. And when they wanted to amend them, they said, [n]o, let's leave them the way they are to give us a little more flexibility.
>
> In other words, they saw that these regulations really were not comprehensive or comprehendible. And they said, [w]ell, let's leave it that way. Let's not clarify it. Now I think they have since abolished this whole thing so its all academic. And I am of the opinion that no crime has been committed. D.E. 356 at 14-15. "D.E." refers to the docket entry from the record.

[11] Under the Medicare Regulations, the home health care agencies, not Allegheny, were ultimately responsible to Medicare for mistakes, late filings, or incorrect procedures. D.E. 309 at 109. Thus, Gupta had every reason, as a client not a boss, to take an active role in the management work that was being done for him. D.E. 312 at 19 n. 25.

Gupta whose bargaining "power" was used to keep costs low since Petitioners' costs were "well below" the Medicare costs cap.

Moreover, the "related party" regulation ambiguously defined "control" as "the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization or institution." 42 C.F.R. § 413.17(b)(3). As discussed above, the business relationship between Allegheny and the home health care agencies does not fall within the "related party" regulation.[12]

HCFA's Provider Reimbursement Manual ("Manual") § 1000 sets forth fact patterns showing relatedness between a Medicare provider and a service company. The examples used in the Manual involve positions of administrative authority, such as holding controlling offices in both organizations, or entering into management contracts for the purpose of obscuring the tracing of funds without any real management separation between the service company and the health care provider. In the example of "indirect control," the Manual establishes that indirect control results when majority ownership will practically require that the minority acquiesce to the dominant decision makers. Here, there is no evidence that Gupta or the Defendant home health care agencies had any ownership interest, much less a controlling interest, in Allegheny.

---

[12] As correctly noted by the district court, "[i]n the context of this case, neither the language of the regulation nor Question 4(a) from the HCFA Form 339 clearly defines what constitutes 'control' under 42 C.F.R. § 413.17(b)(3)." D.E. 312 at 12.

In contrast to the examples in the Manual, "control" under the government's theory was not premised upon the legal authority of an owner, officer, director, or employee. Here, Petitioners had no ownership interest or position in Allegheny. Moreover, none of Gupta's family members held stock or corporate positions in Allegheny. Thus, none of the HCFA profiles for relatedness support the theory that "control" under the "related party" regulation means the bargaining power of a major client.

Close cases have not been criminally prosecuted under the "related party" regulation. Medicare providers have been prosecuted and convicted only where relatedness is based on undeniable legally-based control. *See United States v. Calhoon,* 97 F.3d 518 (11th Cir. 1996) (parent company related to its own subsidiary); *United States v. Woodley,* 9 F.3d 774, 778 (9th Cir. 1993) (significant control and ownership existed where defendant held 100% interest in operator of nursing home and 77% interest in trust that was landlord of nursing home); *United States v. Alemany Rivera,* 781 F.2d 229, 233 (1st Cir. 1985), *cert. denied*, 475 U.S. 1086 (1986) (evidence of relatedness where: (1) a defendant was the corporate president of both the supplier and the hospital provider; (2) the hospital's assistant administrator responsible for equipment purchases was the sole employee of the supplier; and (3) the supplier had no stock or capitalization and its sole source of income came from the provider's mortgage fund). Here, there was no such evidence of legally-based control over Allegheny. Rather, the evidence of "control" in this case was based on the bargaining power of a major client. This is not the type of control contemplated by the "related party" regulation.

The difficulty in pinpointing what kind of conduct or relationship results in relatedness under the related "party regulation" is illustrated in civil cases and administrative hearings and makes it particularly inappropriate in criminal prosecutions. In *Biloxi Regional Medical Center v. Bowen,* 835 F.2d 345 (D.C. Cir. 1987) the court rejected the contention that the hospital and the City of Biloxi were related despite significant connections. In *Biloxi,* the City of Biloxi (the lessor) owned the hospital building leased by assignment to the Medical Center (the provider) which agreed to pay fair market rental and to begin construction of a new facility. As part of the transaction, American Medical Management Hospital Group ("American Medical") was to manage the hospital and provide its expertise to establish the hospital as a regional medical center. Under the terms of the parties' agreement, the mayor had the authority to approve or reject candidates selected by American Medical to fill four of the nine seats on the Medical Center's board of directors. Further, the City agreed to assist in the financing of the new facility for Medical Center by issuing bonds. As a result of their successful business collaboration, the City began receiving substantial rental payments for which the Medical Center claimed Medicare reimbursement.

Based on these circumstances, the Fiscal Intermediary determined that the City and the Medical Center were related and the administrative body hearing the City's appeal, the Provider Reimbursement Review Board ("PRRB") agreed. Nonetheless, the D.C. Circuit reversed, finding that "the evidence relied upon by the PRRB, even when viewed cumulatively, did not provide substantial support for its conclusion that the City and the Center were related by common control *within the meaning of the*

Secretary's regulations." Biloxi Regional Medical Center v. Bowen, 835 F.2d at 353-354 (D.C. Cir. 1987) (emphasis supplied). In its ruling, the court necessarily found that the Board's decision was unsupported by substantial evidence, and that the Fiscal Intermediary and the Board had acted unreasonably in finding relatedness. The court's decision to overrule the PRRB, based on a lack of substantial evidence of relatedness, is thus an especially compelling confirmation of the potential for diverging interpretations concerning an undeniably ambiguous regulation.

The subjectiveness of the "related party" regulation is further demonstrated in an administrative decision in which the related party issue was addressed in detail, *Tennessee Nursing Medical Services v. Blue Cross and Blue Shield* (Hearing Decision No. 93-D100, September 28, 1993). In that case, the PRRB declined to find the provider and its management company were related despite the fact that (1) the owner of the management company had, through a previous firm, provided financing for the provider's startup, and held 50% of the provider's stock as collateral; (2) the management company prepared financial statements for the provider in which it indicated that "we are not independent with respect to [the provider]"; (3) the provider accounted for a majority of the management company's receivables in two of the years in question; (4) the provider's administrative office was located 180 miles away from its closest operational office and adjacent to the management company's office; and (5) the owner of the management company and the Medicare provider's CEO had been "cohabiting," and subsequently married. Such elements are simply absent in the case at bar.

While the government's criminal prosecution required broad and subjective definitions of "power" and "control," it is plain that a more limited and principled construction of the "related party" regulation is reasonable. Indeed, when "power" is used in statutory contexts, the more frequent usage is not a demanding personality or the bargaining power of a major customer. Rather, in statutory contexts, the common meaning of power is the demonstrable legal authority to impose one's will. *Porter v. Household Corp. of Columbus,* 385 F. Supp. 336, 339 (S.D. Ohio 1974) ("[P]ower is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given legal act." *Restatement, Second, Agency § 6, Restatement, Property § 3*); *See also Virginia Trust Co. v. Evans,* 193 Va. 425, 432, 69 S.E. 2d 409, 414 (Va. 1952) ("Generally speaking, the power of the fiduciary to sell means the authority given by statute, or by the instrument creating the trust, or the capacity inherent in the functioning of the office of the fiduciary"); *Stanton v. Preis,* 138 Cal. App. 2d 104, 106, 291 P.2d 118, 119 (Dist. Ct. App. Cal. 1956) ("power" under trust statute is "in the nature of a legal capacity to seek the court's instruction).

At a minimum, it is reasonable in a criminal case to interpret the "related party" regulation as defining "power to control" based on a power to exercise legal authority "directly" through a position as a trustee or corporate president for both entities, as in *United States v. Woodley,* 9 F.3d 774 (9th Cir. 1993) and *United States v. Alemany Rivera,* 781 F.2d 229 (1st Cir. 1985), or "indirectly" through a parent company's stock holding in a subsidiary as in *United States v. Calhoon*, 97 F.3d 518 (11th Cir. 1996).

While "subjectiveness" and "flexibility" may serve administrative goals, these characteristics are incompatible

with criminal charges where certainty and clarity are constitutional imperatives in light of defendant's right to due process. "Criminal sanctions should not be imposed for conduct which is not clearly illegal." *United States v. Larson,* 796 F.2d 244, 247 (8th Cir. 1986). Reasonable minds cannot revise 42 C.F.R. § 413.17 to impose criminal consequences at some unknowable point along the continuum of strong personalities and aggressive bargaining. Accordingly, the government's broad theories for imposing criminality and incarceration would have profound and deeply troubling implications.

In contrast to developing standards based on the legal authority to control decisions – the scenarios of *Woodley* and *Alemany Rivera* – no court has or could reasonably specify the point at which the persuasiveness of bargaining and personality become crimes. Criminal convictions cannot be based on subjective criteria. "Thus, to ensure that a legislation speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably proscribed." *Dunn v. United States,* 442 U.S. 100, 112 (1979).

Therefore, the Eleventh Circuit incorrectly affirmed Petitioners' convictions where the regulations that created the basis for the charges were ambiguous and failed to provide notice of what constituted wrongdoing. The Eleventh Circuit concluded that Gupta and the Corporate Defendants did not misinterpret the question they were asked, not because the question was clearly phrased, but because its underlying purpose should have been clear. However, the history of the provision for "related party" reimbursement contradicts this contention that the regulation is plainly understood. It caused so much confusion that

this reimbursement provision was eliminated. The cases set forth above demonstrate that "related party" is often the subject of competing interpretations in protracted civil litigation. Accordingly, criminal convictions should not be based on such unclear rules because it violates a defendant's right to due process.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the opinion of the United States Court of Appeals for the Eleventh Circuit be reversed and that their convictions be reversed.

Respectfully submitted,

NEAL R. SONNETT, ESQ.
NEAL R. SONNETT, P.A.
2 South Biscayne Blvd.,
Suite 2600
Miami, Florida 33131
Telephone: 305-358-2000
Facsimile: 305-358-1233
Email: nrs@sonnett.com

GENE B. MCCLURE, ESQ.
MCCLURE & MCMORRIES, P.C.
127 Peachtree Street, Suite 440
Atlanta, Georgia 30303
Telephone: 404-688-5000
Facsimile: 404-688-1333
Email: lawmcclure@aol.com

SCOTT A. COLE, ESQ.
Counsel of Record
THOMAS E. SCOTT, ESQ.
COLE, SCOTT &
KISSANE, P.A.
Pacific National Bank
Building
1390 Brickell Avenue,
Third Floor
Miami, Florida 33131
Telephone: 305-350-5300
Facsimile: 305-373-2294
Email:
scott.cole@csklegal.com

Counsel for Petitioners

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-16091

D.C. Docket No. 98-06118-CR-KLR

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

versus

MAHENDRA PRATAP GUPTA,
CARDINAL CARE INC.,
MARSHAL MEDICAL SERVICES, INC.,
ATLANTIC HEALTH CARE SERVICES, INC.,
WEST COAST HEALTHCARE SERVICES, INC., and
TREASURE COAST HEALTH CARE SERVICES, INC.,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(September 5, 2006)

Before ANDERSON, FAY and SILER,* Circuit Judges.

---

* Honorable Eugene E. Siler, Jr., Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

SILER, Circuit Judge:

Individual defendant Mahendra Pratap Gupta, a private health care consultant, appeals from a criminal conviction for conspiracy to submit false claims to the United States, 18 U.S.C. § 286, and two convictions for mail fraud, 18 U.S.C. § 1341. Several corporate defendants operating as home health care agencies, Cardinal Care, Inc., Marshal Medical Services, Inc., Atlantic Health Care Services, Inc., West Coast Healthcare Services, Inc., Treasure Coast Health Care Services, Inc. (collectively the health care agencies will be referred to as "Corporate Defendants," and "Defendants" when including Gupta), also directly appeal their convictions for conspiracy to submit false cost reports to Medicare, 18 U.S.C. § 286. Allegheny Management Company, a health care consulting company, was also convicted but did not appeal.

The district court sentenced Gupta to three years' probation on each conviction to run concurrently and fined him $10,000. It sentenced Marshal Medical, Cardinal Care, West Coast, Treasure Coast, and Atlantic Health to three years' probation. It also fined Marshal Medical and Cardinal Care $1,000 each but did not fine the remaining defendants because they were no longer in business. The imposed sentences also resulted in all Defendants' exclusion from Medicare programs for a period of five years. 42 U.S.C. § 1320a-7. The United States cross-appeals the validity of the sentences. For the reasons discussed below, we AFFIRM all convictions. However, we VACATE and REMAND for re-sentencing with respect to Gupta, Marshal Medical, and Cardinal Care because the court clearly erred in its application of United States Sentencing Guidelines ("USSG") §§ 3B1.1(a) and 2F1.1(b)(1).

REGULATORY SCHEME

The Medicare program is a federal health insurance program for persons 65 years old and older and for certain disabled persons. Under the Medicare program, a home health agency may seek reimbursement for necessary reasonable costs related to patient care. Such reimbursement is administered through fiscal intermediaries – private insurance companies such as Blue Cross and Blue Shield – that contract to manage the Medicare program. Fiscal intermediaries review bills and make payments. The providers, at the end of the year, file "cost reports" seeking settlement of all annual costs.

Under the Medicare regulations, if a provider receives services from a "related" organization, its reimbursement is limited to the supplier's cost rather than the amount paid by the provider. 42 C.F.R. § 413.17 provides:

> (a) Principle. . . . [C]osts applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization. . . .
>
> (b) Definitions –
>
> (1) Related to the provider. Related to the provider means that the provider to a significant extent is associated or affiliated with or has control of or is controlled by the organization furnishing the services, facilities, or supplies.
>
> (2) Common ownership. Common ownership exists if an individual or individuals possess significant ownership or equity in the provider and

> the institution or organization serving the provider.
>
> (3) Control. Control exists if an individual or an organization has the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization or institution.

The Provider Reimbursement Manual, published by the Health Care Financing Administration[1] ("HCFA"), explains the purpose of the "related party" regulation: "(1) to avoid the payment of a profit factor to the provider through the related organization (whether related by common ownership or control), and (2) to avoid payment of artificially inflated costs which may be generated from less than arm's length bargaining." Provider Reimbursement Manual § 1000.

At year end, health care agencies would submit reimbursement forms in which they answered Question A.4.a. of HCFA Form 339, the "Provider Cost Report Reimbursement Questionnaire," requiring the disclosure of goods or services purchased from a "related party." That form states:

> The provider, members of the board of directors, officers, medical staff or management personnel are associated with or involved business transactions with the following: Related organizations, management contracts and services under arrangements as owners (stockholders),

[1] HCFA is now the Centers for Medicare and Medicaid Services.

> management, by family relationship, or any other similar type relationship.[2]

This form is submitted to the fiscal intermediary with each cost report. In section A-6 of each cost report, the home health agencies were asked, "Are there any costs included on worksheet A which resulted from transactions with related organizations as defined in HCFA Pub. 15-1, chapter 10?" In addition, during routine audits of health care agencies, auditors inquired if there were any related party transactions as defined by Medicare regulations.

THE PARTIES

All the Corporate Defendants except Allegheny were home health agencies, or "providers" of care to "homebound" Medicare beneficiaries. Allegheny operated as a health care management consulting firm, owned by Edward Quinlan, and provided business management consulting to the home health agencies – preparing bills, payroll, and Medicare cost reports, and supplying accounting, computer and clerical services.

PROCEDURAL POSTURE

This case began in September 1997 when a federal grand jury in Montana returned a sixteen-count indictment against defendants Gupta, three other natural persons, Allegheny, and ten other companies involved in providing home healthcare services and supplies. In essence, the indictment charged the named defendants

---

[2] Question A.4.a. does not track the regulations language and does not mention the concept of control.

with having created a scheme to defraud Medicare based upon violations of the "related party" regulation by use of false claims, straw owners, and other deceptive actions to conceal the close relationship between the various persons. *See* 42 C.F.R. § 413.17.

In 1998, the case was transferred to the Southern District of Florida pursuant to Rule 21 of the Federal Rules of Criminal Procedure. The district court then severed the trial of four defendants[3] from the trial of Gupta and the six companies. After the district court dismissed thirteen counts of the indictment, the case proceeded to trial on October 25, 1999, against the remaining defendants – Gupta, Quinlan, and Kuldeep K. Hajela, and the remaining six companies, Allegheny, Cardinal, Marshal, Atlantic, West Coast, and Treasure Coast – on the three remaining counts: conspiracy to submit false claims, 18 U.S.C. § 286, and two counts of mail fraud, 18 U.S.C. § 1341.

At the close of the government's case, the district court granted defendant Hajela's motion for a judgment of acquittal and reserved ruling pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure on the motions of the remaining eight defendants. On November 5, 1999, the jury acquitted Quinlan, but convicted Gupta and the six companies, finding them guilty as charged.

Finally, on October 16, 2002, the district court granted the Rule 29 and 33 motions to reconsider its previous denial of their original motions for acquittal or for a new

---

[3] The government subsequently dismissed the charges against those defendants, Vijay Kumar Gupta (Mahendra Gupta's brother) and his three companies, American Home, Franklin, and Greenfield.

trial. It granted acquittals for Allegheny, Gupta, Marshal Medical, Cardinal Care, Atlantic Healthcare, Treasure Coast Healthcare, and West Coast Healthcare or, in the alternative, granted a new trial.

The government appealed, arguing first that the district court had no jurisdiction to entertain the motions for a judgment of acquittal or for a new trial because of the time limits contained in Rules 29 and 33, and that, in any event, the court erroneously granted the motions on the merits. We vacated the orders as untimely and remanded for sentencing. *See United States v. Gupta,* 363 F.3d 1169, 1176-77 (11th Cir. 2004).

THE GOVERNMENT'S CASE

The government alleged that Gupta created Allegheny for the purpose of collecting an additional layer of reimbursable costs from the Medicare program that increases his home health agencies' reimbursable costs closer to Medicare's "cost caps." Subject to the cost caps, Medicare reimburses each home health agency for the costs necessary for the treatment of Medicare beneficiaries. As long as the consultant is not related to the agency by ownership or control, and as long as the agency acts as a prudent consumer in hiring the consultant, Medicare will reimburse the agency for the amount of its consulting contract. *See* 42 C.F.R. § 413.17. Conversely, related party contracts are not negotiated at arm's length and are treated as if the health provider is dealing with itself.

The government alleged that Gupta realized that he could make more money from Medicare if he could charge his home health agencies with consulting fees. With Quinlan's help, Gupta set up Allegheny to provide

management services to help run the Corporate Defendants as home health care agencies. Under the plan, Quinlan would act as the figurehead owner of Allegheny in order to increase the amount billable to Medicare. Allegheny's only employees came from one of the Corporate Defendants.[4]

The government focused on the activities occurring in Montana to demonstrate the relationship between Gupta, the Corporate Defendants, and Allegheny. In 1991, Gupta purchased another home health agency, Independent Home Health Care (IHHC), a Medicare-certified home health care agency, and arranged partly through funds obtained from Corporate Defendants, for Allegheny to effectively become a majority owner of IHHC. In addition, a non-Medicare, private pay home health agency, Independent Home Services (IHS), was sold in the same transaction.

In 1991, Gupta traveled to Montana to purchase IHHC and IHS. The total purchase price was $310,000, with $200,000 allocated for the price of IHHC and $110,000 for the purchase of IHS. On June 12, 1991, Gupta wired $80,000 from Florida to complete the payment of the purchase of IHS. IHS was purchased in Gupta's father's name, Chandra Shekhar. Gupta also arranged for his brother, Vijay Gupta, to wire $20,000 to cover part of the purchase price for IHHC. One day after wiring the $20,000 to Montana, Vijay Gupta received a

---

[4] As a result of this, Gupta was able to charge Medicare between $50 and $150 per hour for the employees' services as opposed to approximately $17 per hour. In the first six months of Allegheny's business operations, it billed Gupta-owned health care agencies more than $1 million for consulting.

check from Mahendra Gupta's wife. All compensation recited in the sales contracts for the IHHC and IHS came either directly, or indirectly, from Gupta or the Corporate Defendants.

Gupta still owed $180,000 on the purchase price of IHHC. He negotiated to hire two of the sellers of IHHC, William Anderson and Matthew Komac, to work for Allegheny. The contracts were guaranteed for $90,000 each for the remainder of 1991. The contracts specified some duties but required little more than their "being available." The employment contracts had no connection to the sales contracts even though they satisfied 90% of the purchase price for IHHC.

One week after the purchase, Allegheny was hired as IHHC's management consultant, charging between $50 and $150 per hour for services that were reimbursed by Medicare. The sellers described that they also required further assurances for payment of the $180,000. Allegheny guaranteed the fulfillment of the employment contracts with an escrow of $100,000. However, at the time the escrow was created, Allegheny did not have $100,000. Gupta and Corporate Defendants loaned Allegheny the necessary $100,000, which was used to purchase two $50,000 certificates of deposit to fund the escrow. Therefore, Allegheny guaranteed the purchase price of one of its future clients with money borrowed from Gupta.

On paper, a newly formed Montana corporation, Capital City Health Services, Inc., held all of the IHHC stock. It was owned by Gupta's friend, Alok Mittal, who had entrusted only $12,000 for Gupta to invest. Mittal's actions were consistent with those of a minority investor, because he left operations of Capital City entirely to

Gupta. He expressed that he had no idea that Allegheny purchased most of IHHC and that he did not know anything about Allegheny. Over the years, Gupta and Allegheny billed IHHC for more than $1 million in consulting fees.

IHHC requested interim rate payments and established cash flow from Medicare. At the end of the fiscal year, IHHC reported to Medicare that it had no related party contracts to reveal. When the fiscal intermediary followed with a cost report audit, it asked IHHC if it shared any common relationship with its consultants. Consistent with its cost reports, IHHC denied any related party relationship.

In 1993, a friend of Gupta's brother, Dr. M.M. Vyas, invested $10,000 for one-third of Capital City stock and replaced Jean Komac as IHHC's administrator. Like Mittal, Vyas had no apparent knowledge that he was only a figurehead. Gupta told Vyas and Mittal that he wanted to renew the consulting contract with Allegheny, and it was renewed. Mittal did not know anything about the hiring of consultants, but assented with Vyas.

Gupta ran IHHC and directed it to retain Allegheny as a consultant. In essence, Allegheny and Gupta owned IHHC. A week after the purchase, Allegheny became IHHC's management consultant, charging between $50 and $150 per hour for services reimbursable by Medicare. Gupta also became a consultant to IHHC. Vyas stated that he stayed at IHHC for a short time but wanted to leave. He expressed that he only signed paperwork to appease Gupta and get his initial investment back.

In 1994, Gupta arranged for the sale of IHHC to St. Peter's Hospital in Montana and deposited much of the

proceeds from the sale to an Allegheny account. Vyas flew to Helena, Montana and attended the closing for 10 to 15 minutes and signed the necessary paperwork. Mittal stated that he did not know about the sale until after it occurred. St. Peter's Hospital paid $700,000 for IHHC and IHS. The $500,000 for IHHC was deposited into an account held by Allegheny. The remaining $200,000 was deposited to the account of the owner of IHS, Chandra Shekhar, Gupta's father. Numerous witnesses testified that Allegheny was controlled by Gupta. Witnesses described Quinlan, the owner of Allegheny's stock, as an occasional visitor to Allegheny.

From 1991 to 1997, Medicare reimbursed Corporate Defendants and IHHC more than $15 million in Allegheny's fees. Allegheny's client agencies were all associated with Gupta or his brother Vijay Gupta. Witnesses established that Gupta ran Marshal Medical, Cardinal Care, Atlantic Health, West Coast Health, and Treasure Coast Health. The owner of Marshal Medical and Atlantic Health was a man named Dev Raj. The owner of West Coast Health and Cardinal Care was a woman named Shanno Devi. Immigration files showed that Raj and Devi are actually Mr. and Mrs. Goyal, the in-laws of Mahendra Gupta's brother, Vijay Gupta. There is evidence that Raj and Devi were straw owners who supported Gupta in exchange for immigration assistance. The owner of Treasure Coast was a Pakistani doctor named C.D. Punwani, who was also a medical records file clerk for Cardinal Care, where she was hired upon Gupta's request.

Between 1991 and 1997, Corporate Defendants claimed reimbursement for Gupta's and Allegheny's

consulting fees.[5] At the end of each fiscal year, each Corporate Defendant submitted HCFA Form 339 indicating that there were no related-party transactions with its consultants to report. In addition, each cost report included a worksheet A-6 that asked the question mentioned *supra*. If the health care agency answered "Yes," it was required to explain in detail the contractual relationship. During audits by the financial intermediary, Blue Cross and Blue Shield of Iowa, an auditor asked, "Is the owner of Independent in any way related to Allegheny?" IHHC responded that there was no relationship between the owners of IHHC and Allegheny. One estimate calculated by KPMG approximated that the fees were $3.4 million in excess of what Medicare would have paid had it known the true relationship of the parties.

ANALYSIS

I. Conviction

The Corporate Defendants and Gupta present three arguments challenging their convictions: (1) 42 C.F.R. § 413.17 does not legally support a conspiracy conviction under 18 U.S.C. § 286 because the regulation is essentially unclear; (2) the evidence was insufficient to support a conspiracy conviction under 18 U.S.C. § 286; and (3) Gupta's mail fraud convictions are not supported by sufficient evidence, 18 U.S.C. § 1341.

---

[5] Several subcontractors also take the fraud beyond Allegheny with the use of Arbors Management, a HUD housing management firm; DataMed, a computer-related subcontractor; Arbenz, an equipment rental and leasing business. Witnesses testified that Gupta used these companies to increase billing to Medicare.

A. The Related Party Regulation, 42 C.F.R. § 413.17, and Ownership and Control

Defendants argue that as a matter of law they cannot be held liable for conspiracy to submit false claims to the government on the basis that Gupta controlled Allegheny and Corporate Defendants under the related party regulation. Defendants rely upon *United States v. Whiteside,* 285 F.3d 1345, 1351 (11th Cir. 2002), for the proposition that "where the truth or falsity of a statement centers on an interpretive question of law" the government must prove the statements were "knowingly and willfully false" as well as proving that the statement was untrue beyond a reasonable doubt "under any reasonable interpretation of the law." *Id.* Defendants also assert that the only allegedly false statement stems from Question A.4.a. of HCFA Form 339. On that form, the home health agencies each certified that they did not receive services from a related party by checking "no" instead of "yes" and submitting such forms between 1991 and 1997. In addition, they contend that the question from HCFA Form 339 does not define control and that Gupta's behavior is properly characterized as a controlling personality or client.

We review questions of law de novo. *United States v. McDaniel,* 338 F.3d 1287, 1288 (11th Cir. 2003). Conspiring to submit false claims to a government agency is prohibited. 18 U.S.C. § 286. Under Medicare regulations related party transactions are not prohibited; however, a provider can only be reimbursed for the actual cost incurred by the related entity. 42 C.F.R. § 413.17. Thus, "actual cost must not exceed the price for which comparable services, products, or facilities could be purchased elsewhere." *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.,* 384 F.3d 168, 173 (5th Cir.

2004). Under the related party provision, "related to the provider" is defined as the "provider to a significant extent is associated or affiliated with or has control of or is controlled by the organization furnishing the services, facilities or supplies." 42 C.F.R § 413.17(b)(1).

The indictment alleged both ownership and control theories. There is little evidence of Gupta's overt ownership of the Corporate Defendants or Allegheny. He was not a stockholder, owner, officer, director, employee, or member of Allegheny's management structure because Quinlan was listed as the owner, president, and sole stockholder of Allegheny. The government concedes that on paper the Defendants and Allegheny were owned by persons other than Gupta.

Nonetheless, control exists "if an individual or an organization has the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization or institution." 42 C.F.R. § 413.17. Control is generally viewed as a broad encompassing term. "The term 'control' includes any kind of control, whether or not it is legally enforceable and however it is exercisable or exercised. It is the reality of the control which is decisive, not its form or the mode of its exercise." *Kidney Ctr. v. Shalala,* 133 F.3d 78, 84 (D.C. Cir. 1998) (citing U.S. Dep't of Health & Human Services, Medicare Provider Reimbursement Manual, Part I, § 1004.3, reprinted in 1 Medicare & Medicaid Guide (CCH) P 5700 (Nov. 1994)). "Section 413.17 provides that both direct and indirect abilities to influence significantly the provider at the time of the transaction establishes control." *Sid Peterson Mem. Hosp. v. Thompson,* 274 F.3d 301, 309 (5th Cir. 2001).

While we have little case law on ownership or control under the related party regulation, the case of *Sid Peterson* provides some guidance. *Id.* In *Sid Peterson,* the Fifth Circuit upheld the Secretary of Health and Human Services's interpretation of control under the related party regulation in the context of a dispute for reimbursement under Medicare. Formal control was not required. Sufficient evidence of "ability to influence significantly the other in the bargaining process so that it could dictate the terms of the ultimate agreement" satisfied the control requirement. *Id.* The court held:

> The regulations, therefore, contemplate a fact-intensive inquiry into the relationship of the parties, logically concluding that direct control over a provider during the bargaining process could result in the continued manifestation of that control in the final agreement. In order to make the determination that the transaction is a product of a bargaining process tainted by one party's ability to control the other, the Secretary should consider "the entire body of facts and circumstances involved." U.S. Dep't of Health and Human Services, Medicare PRM, Part I, § 1004.3.

Id. "The Secretary has concluded that §§ 413.153 and 413.17 permit consideration of the relationship between the parties during the entire process of negotiation leading up to a transaction in determining whether the parties were related through control at the time of the transaction." *Id.* at 311.

In fact, courts have had little trouble discerning when organizations are "related," illustrating that interpreting that term is well within the competence of the judiciary. *See, e.g., Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504,

509 (1994); *Sid Peterson,* 274 F.3d at 309-11; *Monongahela Valley Hosp., Inc. v. Sullivan,* 945 F.2d 576, 591-92 (3d Cir. 1991). Juries have convicted individuals in analogous factual settings, illustrating the term is also not beyond their interpretive abilities. *See, e.g., United States v. Alemany Rivera,* 781 F.2d 229, 231-32 (1st Cir. 1985).

Moreover, Medicare regulations eliminate the potential for ambiguity by providing definitions for a "related organization." *See* 42 C.F.R. § 413.17(b)(1). "Related to the provider," "common ownership," and "control" are likewise defined. *See id.* § 413.17(b)(1)-(3); *see also Alpharma Inc. v. Pennfield Oil Co.,* 411 F.3d 934, 939 (8th Cir. 2005) (stating that "the meaning of agency publications in the Federal Register and Code of Federal Regulations . . . is well within the 'conventional experience of judges' "). Medicare regulations even provide examples of organizations that would be related. *See* 42 C.F.R. § 413.17(c).

With the understanding that the concepts of related party and control are clearly defined by Medicare, we examine the Defendants' claims under *Whiteside,* 285 F.3d at 1351. In a case where the truth or falsity of a statement centers on an interpretive question of law, the government bears the burden of proving beyond a reasonable doubt that the defendant's statement is not true under a reasonable interpretation of the law. *Id.*; *accord United States v. Parker,* 364 F.3d 934, 944-45 (8th Cir. 2004).

In *Whiteside,* we held that the government could not meet its burden of proof to support a conviction for making a false statement in Medicare cost reports and for conspiracy to defraud the government by making false statements under 18 U.S.C. §§ 371 and 2 "where no Medicare regulation, administrative ruling, or judicial decision exists that

clearly requires interest expense to be reported in accordance with the original use of the loan." 285 F.3d at 1352 (citation omitted). The specific regulation at issue governed the amount of interest to attribute to capital improvements in cost reports submitted to Medicare under 42 C.F.R. § 413.153(b)(1). If the interest was capital related, the reimbursements would have been greater.

In *Whiteside,* we reversed on the basis that the government could not prove the *actus reus* of the offenses, concluding that the defendants' interpretation that the Medicare regulations authorized the treatment of debt interest as capital-related was not unreasonable, even if the funds underlying the debt were initially used for non-capital purposes. Moreover, no authority answered the question posed and so reasonable people could differ as to whether the debt interest was capital-related. *Id.* ("'competing interpretations of the applicable law [are] far too reasonable to justify these convictions.'").

Whiteside differs from this case in several significant ways. First, the related party rule is well defined and there is case law discussing its application. Although control is broadly defined, it is not ambiguous: the management company and the health care provider may not be on the same side of the transaction. *See Alemany Rivera,* 781 F.2d at 231-32. Second, the holding in *Whiteside* dealt with a far more debatable application of a regulation for categorization of debt under 42 C.F.R. § 413.153(b)(1). Here, we are dealing with the concept of control over organizations. The purpose of the related party rule is not susceptible to any other interpretation. Moreover, Gupta's interpretation that the related party regulation should not apply to an arguably overbearing client does not accord with "any reasonable interpretation" as set

forth in *Whiteside*. There is no reasonable interpretation of 42 C.F.R. § 413.17 that would allow him to be on both sides of a transaction. Furthermore, his claim that he was an arguably overbearing client is not an interpretation of a regulation; it is a factual claim that goes to the sufficiency of the evidence.

The regulatory context demonstrates that there are no reasonable interpretations of the related party rule that render the cost reports factually accurate. The cost reports require that the provider answer the question previously discussed that refers to chapter 10. Chapter 10 effectively reiterates the related party regulation. The cost reports did not identify that services had been provided by related parties when Corporate Defendant home health agencies submitted them for payment.

Moreover, Gupta could not have misunderstood Form 339 and its reporting requirements under Medicare regulations and the related party rule. Gupta's accountant, Frank Blohm, testified that Gupta was aware of the conduct prohibited by the related party regulation. A knowing and intentional violation of the related party regulations can support a finding of criminal intent for conspiracy to submit false claims to Medicare. Form 339 Cost Report Questionnaires should not be considered outside of the regulatory context to prevent inflated reimbursement requests. Gupta cannot argue otherwise by his own acknowledgment that he understood the related party transaction rules.

We hold that failing to accurately report to Medicare that a related party is providing management consulting services is actionable as a false statement under 18 U.S.C. § 286 because the related party has the ability to influence

significantly the other in the bargaining process so that it could dictate the terms of the ultimate agreement. *See Alemany Rivera,* 781 F.2d at 231-32.

B. Sufficiency of the Evidence.

We review for sufficiency of the evidence to determine whether Gupta (1) controlled the Corporate Defendants under the related party rule and (2) conspired to submit false cost reports to Medicare. Sufficiency of the evidence is a question of law that we review de novo. *United States v. Massey,* 89 F.3d 1433, 1438 (11th Cir. 1996), *cert. denied,* 519 U.S. 1127 (1997). The relevant question for a reviewing court, in judging the sufficiency of the evidence, is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). We resolve all reasonable inferences and credibility evaluations in favor of the jury's verdict; we will uphold the jury's verdict if a reasonable fact finder could conclude that the evidence establishes the Defendants' guilt beyond a reasonable doubt. *United States v. Starke,* 62 F.3d 1374, 1380 (11th Cir. 1995).

Defendants argue that the conspiracy conviction should be reversed because an agreement to submit false claims was not proven beyond a reasonable doubt. They posit that there was no agreement between Quinlan and Gupta or anyone else to defraud Medicare. In support, the Defendants highlight that no money can be traced from Allegheny to Gupta or any of the other Defendants.

This court will sustain a conviction for conspiracy to submit false claims to the United States,[6] if the government proved "the existence of an agreement to achieve an unlawful objective, the defendant's knowing and voluntary participation in the conspiracy, and the commission of an overt act in furtherance of it." *United States v. Suba,* 132 F.3d 662, 672 (11th Cir. 1998) (citing *United States v. Kammer,* 1 F.3d 1161, 1164 (11th Cir. 1993)). Conspiracy may be proven by circumstantial evidence and the extent of participation in the conspiracy or extent of knowledge of details in the conspiracy does not matter "if the proof shows the defendant knew the essential objective of the conspiracy." *Suba,* 132 F.3d at 672 ("a common purpose or plan may be inferred from a development and collocation of circumstances"). Any differences between allegations and proof is reversible only when the defendant is actually prejudiced. *Id.* at 673.

Under these legal principles, the evidence proved an overarching conspiracy to submit false claims to Medicare concealing Gupta's controlling relationship between Allegheny and Corporate Defendants. A reasonable juror could justifiably find, beyond a reasonable doubt, that the conspiracy to submit false documents by Corporate Defendants, Gupta, and Allegheny, alleged in the indictment, was the conspiracy proven.

---

[6] 18 U.S.C. § 286 prohibits submission of false claims to the United States:

> Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.

First, the evidence is sufficient to permit a reasonable juror to determine that Gupta controlled Allegheny under the related party regulation. The evidence established that Gupta: (1) created Allegheny; (2) managed the day-to-day affairs from his office in Allegheny; (3) directed the work of its employees; (4) had an employee of Allegheny as his secretary; (5) hired an independent contractor and other employees to work for Allegheny; (6) discussed hiring and firing an Allegheny employee; and (7) obligated Allegheny to pay IHHC through two employment contracts. Moreover, there was evidence that "no one would move [at Allegheny] without M.P. [Gupta's] permission."

Second, the proof showed a connection with and control over the Corporate Defendants. Gupta hired the administrator for IHHC and hired Allegheny and himself as consultants. Gupta spoke of owning Treasure Coast and IHHC, he created West Coast Health Care, and he was in charge of Cardinal Care. He used in-laws of his brother as a front for several of Corporate Defendant home health agencies in exchange for help with immigration matters.

Third, as to conspiracy, Defendants contend that there was no express agreement between Quinlan, employees of the Corporate Defendants, and Gupta, and no circumstantial evidence from which a conspiracy could be inferred. The evidence is sufficient to establish through Gupta's, the Corporate Defendants', and Allegheny's dealings with IHHC in Montana, that a conspiracy existed between Corporate Defendants, Allegheny, and Gupta to conceal their relationship in order to submit inflated cost reports and receive Medicare reimbursement for consultation services the costs of which were not bargained for at arm's length.

Gupta and the Corporate Defendants took extraordinary steps to conceal the relationship with the financial intermediary. They used dummy employment contracts, false and misleading corporate minutes, straw owners, forged contracts, backdated correspondence, and false invoices that were cosmetically altered to make them look older. The evidence was sufficient to prove that Gupta controlled both Corporate Defendants and Allegheny and conspired to submit false cost reports concealing their true relationship. *See United States v. Ndiaye,* 434 F.3d 1270, 1294 (11th Cir. 2006) (evidence of conspiracy does not have to be overwhelming). The government has proven Gupta's and the Corporate Defendants' awareness of the essential nature of the conspiracy and sufficient circumstantial evidence. *See United States v. Lluesma,* 45 F.3d 408, 410 (11th Cir.1995).

C. Mail Fraud, 18 U.S.C. § 1341

Gupta generically appeals his mail fraud convictions, categorized as Counts II and III in the indictment, but provides no argument or legal support. We may decline to address an argument where a party fails to provide arguments on the merits of an issue in its initial or reply brief. Without such argument the issue is deemed waived. *See Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1573 n. 6 (11th Cir.1989) (deeming issue waived where party fails to include substantive argument and only makes passing reference to the order appealed from). Accordingly, we hold that the evidence was sufficient to permit a reasonable jury to conclude that Gupta conspired to submit false claims to the government. The scheme involved two mailed checks. The jury could reasonably infer Gupta's guilty knowledge and participation in the scheme

to submit false claims to Medicare from the whole of the evidence presented and strong circumstantial evidence that the checks were mailed. There was sufficient evidence to support Gupta's convictions on these counts.

II. Government's Sentencing Cross-appeal

The district court held its first sentencing hearing in 2001 but did not impose sentence. During that time, the government introduced a sentencing memorandum. It included the expert report of Gary Young calculating a loss to Medicare of $6.19 million, which is determined by summing the amounts by which the health care consulting fees charged by Gupta and Allegheny to each of the Corporate Defendants and IHHC exceeded the costs for the services (the profit to Allegheny from the Corporate Defendants and IHHC). In October 2002, the district court granted a judgment of acquittal but we found that the motion was untimely and remanded to the district court with instructions to impose sentence. *Gupta,* 363 F.3d at 1176-77. The government filed a second sentencing memorandum that included expert reports from Jeff Litvack and Shirill Garvey. Both expert reports calculated the amount of loss to Medicare for Guidelines purposes. Garvey's report supported KPMG's calculation of loss as the profits to Allegheny that resulted from billing the Corporate Defendants and IHHC for management fees at amounts in excess of its cost. The Litvak Report calculated the amount of loss as Allegheny's net profits from the Corporate Defendants and IHHC. Litvak reasoned that the costs of services furnished to a provider by a related party were includable in the allowable costs of the provider at the cost to the related organization. Thus, neither Corporate Defendants nor IHHC was entitled to be reimbursed by

Medicare for amounts that exceeded Allegheny's cost to provide management services to them. Litvak calculated losses of $3.4 million. The government also referenced the Yong report from its first sentencing memorandum and filed a supplemental sentencing memorandum to remind the court of its prior findings.

The district court sentenced Gupta and the Corporate Defendants on November 5, 2004. During the sentencing hearing, Gupta and Corporate Defendants objected to a 14-level increase under USSG § 2F1.1(b)(1)(O) contending that the amount of loss was calculated incorrectly. The district court sustained the objection and found that the government incurred no loss. Gupta and Corporate Defendants also objected to the 2-level increase under § 2F1.1(b)(2)(A), contending that the offense did not involve more than minimal planning. The district court overruled the objection finding that it did involve more than minimal planning. Gupta objected to a 4-level increase under USSG § 3B1.1(a), contending that there were not enough participants to warrant the adjustment and the offense behavior was not otherwise extensive. The district court found that the scheme was not otherwise extensive, in that it involved only the failure to check off the correct box in Question A.4.a. of HCFA Form 339.

The district court reasoned that (1) there was a $90 cap per day for services, (2) each of the Corporate Defendants was substantially below that cap, (3) when Gupta was forced to sell, a hospital took over and raised expenses substantially, (4) the government was not concerned that a home health care provider that charged less for services was replaced by one that charged more, and (5) the government had not suffered a loss, as it did not mind paying more money (at least up to the cost cap of $90 per day).

The court also denied the government's request to include the Litvak loss report in the sentencing record.

The government objected to the district court's finding of no loss and the resulting lack of enhancement, contending that the loss was at least $3.4 million. The government also objected to the district court's finding that a four-level leader enhancement under § 3B1.1(a) for Gupta was not warranted after finding that the scheme was not otherwise extensive.

The district court relied on the following Guideline calculation:

Offense Level:	Relevant Guideline Provision		
a. Base Offense Level	2F1.1(a)		6
b. Specific Offense Characteristics:	2F1.1(b)(1)(A)	+	0
	2F1.1(b)(2)(A)	+	2
c. Adjustments:			
i. Enhancements:	none		0
ii. Reductions:	none		0
Adjusted offense level:	8		
Criminal History Category	I		
Applicable Guideline Range (Gupta)	0 to 6 months		
Departure (if applicable)	none		

It applied two points for the more than minimal planning enhancement under USSG § 2F1.1(b)(2). All Defendants received three years probation. It fined Gupta $10,000, and Cardinal Care and Marshal Medical $1,000

each. The district court found that West Coast, Treasure Coast, Atlantic Health no longer operated as going concerns and did not fine them.

The district court stated during the sentencing hearing:

> In other words, they saw that these regulations really were not comprehensive or comprehendible. And they said, Well, let's leave it that way. Let's not clarify it. Now I think they have since abolished this whole thing so it's all academic. And I am of the opinion that no crime has been committed. Now, you want me to sentence at the high end of this range? No way. I'm going to give him the low range.
>
> Now, it may be that the 11th Circuit will decide that a crime has been committed. But it seems to me they would have to overrule their *Whiteside* opinion to do so. And they have that administrative opinion, the Tennessee nurse's case, which seems to me not even a criminal level. They said it was – there was no finding of fault.
>
> As I indicated at a prior time, it's amazing to me that somebody could be convicted of a felony based upon a bureaucratic regulation. Now, I know you say, well, he made a false statement and/or mail fraud or something. But these regulations were so poorly drawn and so obscure that I don't see how within either – how a jury could find an intent to defraud beyond a reasonable doubt. So these are the factors that I'm relying upon in imposing sentence.

A. Leader or Organizer under § 3B1.1(a).

In its cross-appeal, the government argues that the district court erred in sustaining Gupta's objection to a 4-level enhancement under § 3B1.1(a) after finding that Gupta was not the leader or organizer of an "otherwise extensive" scheme. The government contends that the district court failed to make the necessary inquiry as to Gupta's role in the crime given (1) the number of participants he enlisted and the extensiveness of the scheme; (2) that there were at least four knowing participants in Gupta's scheme, including Jean Komac (IHHC administrator), Al Agrawal and Lola Badillo (employees of Allegheny), and Kuldeep Hajela (an acquitted co-defendant); (3) that Gupta relied upon or used, numerous unwitting participants (Mittal, Vyas, Punwani, Raj, Devi); (4) that Gupta served as both the organizer and leader of the scheme, in that he moved the money, directed the actions of the companies involved, and hired himself; and (5) that the scheme was extensive, in that it involved six home health agencies in four states submitting false cost reports between 1991 and 1997 with profits of $ 3.4 million.

This court reviews a sentencing court's determination of a defendant's role in the crime for clear error. *United States v. Ramsdale,* 61 F.3d 825, 830 (11th Cir. 1995). Section 3B1.1(a) provides, "If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels." The commentary provides that in most instances, "the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." *See* USSG § 3B1.1, comment. (n.2). In assessing a defendant's role in the offense, the factors the courts should consider include:

> (1) the exercise of decision making authority, (2) the nature of participation in the commission of the offense, (3) the recruitment of accomplices, (4) the claimed right to a larger share of the fruits of the crime, (5) the degree of participation in planning or organizing the offense, (6) the nature and scope of the illegal activity, and (7) the degree of control and authority exercised over others.

USSG § 3B1.1, comment. (n.4). "Section 3B1.1 requires the exercise of some authority in the organization, the exertion of some degree of control, influence, or leadership." *Ndiaye,* 434 F.3d at 1304 (citing *United States v. Yates,* 990 F.2d 1179, 1182 (11th Cir. 1993)). A "participant" is defined as a "person who is criminally responsible for the commission of the offense, but need not have been convicted." USSG § 3B1.1.

The district court clearly erred in finding that the criminal activity was not otherwise extensive. Gupta's PSI detailed that (1) he funded and controlled Allegheny, though it was owned in name by Quinlan; (2) he ran each of the Corporate Defendants and IHHC, though they were actually owned by various straw owners; (3) Allegheny, the Corporate Defendants, and IHHC were defined as related companies under applicable Medicare regulations, as Gupta controlled each entity; (4) Allegheny provided and billed $15 million worth of consulting services to each of the Corporate Defendants and IHHC; (5) Medicare reimbursed the Corporate Defendants and IHHC; (6) as Allegheny was related to each of the Corporate Defendants and IHHC, such fees should have been limited to the costs to Allegheny of providing the services; and (7) in each cost report filed by Allegheny on behalf of the Corporate Defendants and IHHC, the Corporate Defendants and

IHHC improperly failed to disclose that each was related to Allegheny. Gupta did not object to these particular findings of fact in his sentencing memoranda or at the sentencing hearings. Therefore, such facts are deemed admitted for sentencing purposes. *See United States v. Shelton,* 400 F.3d 1325, 1330 (11th Cir. 2005) (holding that factual findings set forth in a PSI not objected to by a defendant are deemed admitted).

Contrary to Gupta's assertions, the criminal activity was quite complex and is not susceptible to simple categorization as the failure to check a box on a medicare form. *See* USSG Ch. 3, Pt. B, comment. ("The determination of a defendant's role in the offense is to be made on the basis of all [relevant] conduct within the scope of § 1B1.3."). The record shows extensive criminal activity, as it involved seven corporations, numerous straw owners, Medicare reimbursements of over $15 million, and repeated failure to disclose related party status over a seven-year period. *See United States v. Holland,* 22 F.3d 1040, 1046 (11th Cir. 1994) (considering "factors relevant to the extensiveness determination, including the length and scope of the criminal activity in addition to the number of persons involved").

The district court did not make a finding under § 3B1.1(a) as to whether (1) Gupta had a leadership role or (2) the offense involved at least one other person who was criminally responsible. *See United States v. Mesa,* 247 F.3d 1165, 1168 (11th Cir. 2001); *United States v. Costales,* 5 F.3d 480, 484 (11th Cir. 1993). It addressed these related issues during the first sentencing hearing when it inquired from the government to name persons Gupta was supervising in the criminal conspiracy. The government pointed to Hajela as Gupta's front man at Allegheny, but then

contended that its primary argument was that the scheme was otherwise extensive. The district court sustained Gupta's objection to the enhancement, finding that the scheme was not otherwise extensive without addressing Gupta's leadership role or whether other criminally responsible persons were involved. It was clear error for the district court not to make a finding that Gupta's criminal activity was otherwise extensive.

B. Finding of Loss under § 2F1.1(b)(1)

The government argues that the district court erred in finding that no loss occurred. The government first contends that the district court made no finding of loss because it was of the opinion that "no crime [had] been committed." In addition, the government asserts that the amount of the loss should be determined from the applicable Medicare regulations as (1) the amounts received by Allegheny from Medicare through Corporate Defendants and IHHC for Allegheny's services less (2) the costs to Allegheny in providing such services.

Contrary to the government's argument, the district court did make a loss finding of zero. It found that the loss was determined as the amounts by which each of the Defendants and IHHC exceeded the applicable Medicare reimbursement caps, which was equal to zero as such companies operated at up to $25 million below the applicable caps. The court reasoned that this was the correct measure of loss because the government did not mind paying up to such caps, as evidenced by the fact that St. Peter's Hospital was reimbursed at a higher rate for the services of IHHC, after its purchase from Gupta.

The government prefers that loss is calculated by the following methodology: (1) the amount received by Allegheny from Medicare through the Corporate Defendants and IHHC for Allegheny's consulting services less (2) the actual costs to Allegheny in providing such services (or Allegheny's profits from the Corporate Defendants and IHHC). The defendants argue that the district court was correct or, in the alternative, that the reasonableness of the fees Allegheny charged should be used to determine the amount of loss.

As a preliminary matter, we note that USSG § 2F1.1(b)(1) has been deleted by its consolidation with § 2B1.1 as of November 2001. Nevertheless, we apply the Guidelines in application at the time of sentencing, although, in effect, there is no identifiable difference in our analysis based upon the consolidation. *United States v. Aduwo,* 64 F.3d 626, 628 (11th Cir. 1995) ("Generally a sentencing court should apply the guidelines in effect at the time of sentencing."). Calculations of loss under USSG § 2F1.1(b)(1), involve both legal and factual issues. *Id.* We review a district court's factual findings for clear error and its application of the Guidelines de novo. *United States v. Phillips,* 413 F.3d 1288, 1292 (11th Cir. 2005). Generally, "loss is the value of the money, property, or services unlawfully taken." USSG § 2F1.1 comment. (n.8). Fraud is conjured in numerous variations and that should be considered when choosing a calculation methodology for the harm intended or caused. *See United States v. Orton,* 73 F.3d 331, 333 (11th Cir. 1996). Furthermore, because loss is often not calculable "with precision," the district court need only "make a reasonable estimate of the loss, given the available information." USSG § 2F1.1 comment.

(n.9); *Orton,* 73 F.3d at 335 (citation and emphasis omitted).

"'[L]oss' under § 2F1.1(b) is a specific offense characteristic intended to measure the actual, attempted, or intended harm of the offense." *United States v. Munoz,* 430 F.3d 1357, 1369 (11th Cir. 2005) (citation omitted). We have identified two of the more commonly used forms of calculation: (1) the "loss to the losing victims" method; and (2) the defendant's gain or "net gain" method. *See United States v. Bracciale,* 374 F.3d 998, 1003 (11th Cir. 2004). The sentencing court is in the best position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. USSG § 2B1.1, comment. (n. 3(c)). Thus generally a district court's "reasonable estimate of the intended loss will be upheld on appeal." *United States v. Renick,* 273 F.3d 1009, 1025 (11th Cir. 2001). However, such calculation may not be mere speculation and the government bears the burden of supporting its loss calculation with reliable and specific evidence. Finally, a district court must make factual findings sufficient to support the government's claim of the amount of fraud loss attributed to a defendant in a PSI. *United States v. Martin,* No. 05-13526, 2006 WL 637837, at *3 (11th Cir. Mar. 15, 2006) (slip. op.) (citing *United States v. Cabrera,* 172 F.3d 1287, 1294 (11th Cir. 1999)).

In this case, the district court's finding of no loss is not a reasonable estimate. The district court did not apply relevant calculation as to the greater of intended or actual loss. The court's belief that no crime was committed does not nullify its duty to calculate the Guidelines loss amount. Moreover, the purpose of the related party rule is to prevent the payment of artificially inflated consulting

fees. Medicare's willingness to pay up to its cost caps does not absolve Gupta from his violation of the related party regulations or from his liability for submitting false claims to Medicare. The "no harm, no foul" argument culminating in a calculation of no loss to the government has been regarded as an insufficient rationale by which to calculate loss. *See United States v. Adam,* 70 F.3d 776, 782 (4th Cir. 1995) (rejecting under Guideline § 2F1.1 a "no loss" argument; stating that the amount of defendant's gain is an available, alternative measure of estimating that loss and concluding that "[t]he dollars paid to Appellant, in other words, are dollars that were needlessly drained from the Medicare system."). The amount the Government paid in response to the false claims is an appropriate measure of damages. *Cf. United States v. TDC Management Corp.,* 288 F.3d 421, 428 (D.C. Cir. 2002). Because the district court's application of the finding of loss was clearly erroneous under § 2F1.1(b)(1), we also conclude that the fines imposed against Marshal Medical and Cardinal Care were clearly erroneous.[7]

CONCLUSION

We AFFIRM Gupta's and the Corporate Defendants' convictions. The sentences for Gupta, Marshal Medical, and Cardinal Care are hereby VACATED and REMANDED for re-sentencing. We AFFIRM the sentences imposed on Atlantic Health, West Coast, and Treasure Coast.

---

[7] Additionally, because the district court found that Atlantic Health, West Coast, and Treasure Coast were no longer in business and thus unable to pay a fine, and the government does not contest that finding, the imposition of no fine is unchallenged.

United States District Court
Southern District of Florida
WEST PALM BEACH DIVISION

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	**Case Number: 0:98-6118-CR-RYSKAMP**
MAHENDRA PRATAP GUPTA	USM Number: 05737-046
	Counsel For Defendant: Neal R. Sonnett, Esq. Counsel For The United States: Leif Johnson, Esq. Court Reporter: Mary Desiderio, Official Reporting Service
	(Filed Nov. 9, 2004)

The defendant was found guilty by a jury of Counts One, Two and Three of a Three Count Redacted Indictment on November 5, 1999. The defendant is adjudicated guilty of the following offenses:

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 286	Conspiracy to submit false claims	July 20, 1998	One
18 U.S.C. § 1341	Mail fraud	July 20, 1998	Two and Three

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

The Court further finds that the defendant's sentence is stayed pending the outcome of the appeal. If the defendant decides not to appeal, the term of probation and fine are due to begin within 60 days of this judgment.

Date of Imposition of Sentence:
November 5, 2004

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
United States District Judge

November 8, 2004

PROBATION

The defendant is hereby sentenced to probation for a term of **Three (3) years** as to Counts One, Two and Three to be served concurrently.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit

to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional condition(s) of probation:

No additional conditions of probation were imposed.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$200.00	$10,000.00	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

Lump sum payment of **$200.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shalt be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 98-6118-CR-RYSKAMP

UNITED STATES OF AMERICA,	:
Plaintiff,	:
	:
vs.	:
	:
MAHENDRA PRATAP GUPTA,	:
Defendant.	:

SENTENCING ORDER

(Filed Nov. 8, 2004)

This case having come before the Court following remand from the Eleventh Circuit Court of Appeals in *United States v. Gupta,* 363 F.3d 1169, 1174 (11th Cir. 2004) for Defendant Mahendra Pratap Gupta, the Court finds as follows:

I.
BACKGROUND

1. On November 5, 1999, Mahendra P. Gupta and the defendant home health agencies were convicted by a jury for violating Medicare regulatory requirements that the defense had argued were badly written, extremely unclear, and which no longer constitute a criminal offense. Because of the complexity of critical sentencing issues, including the "loss" issue,[1] the sentencing hearing did not take place until January 26, 2001.

[1] The loss issue was significant because the applicable Sentencing Guideline, U.S.S.G. §2F1.1(b)(1), required an increase in the base

(Continued on following page)

2. Prior to the sentencing hearing, both the defense and the government had filed extensive sentencing memoranda, PSI objections, and expert reports.[2] At that hearing, the Court also heard additional oral argument from counsel, and announced its findings regarding the appropriate sentences to be imposed. However, the Court declined to formally impose the sentences and advised the parties that it had other concerns:

> THE COURT: Now, there are other concerns that I have in this case, because they came up prior to the trial. And the defense had made lengthy arguments regarding whether or not this regulation was sufficiently clear, whether or not this was really a crime based upon interpretations of the board, the administrative hearings, whether somebody could know that this would be a violation. As I indicated then, you don't, in a criminal case you can't get summary judgment before you hear the evidence. And so with the evidence now, I still am somewhat concerned about these issues.

3. The Court then expressed its concern about whether the regulations were sufficiently clear and whether "interpretations from courts and administrative agencies would say that this is indeed a criminal offense" and requested additional argument on those issues:

---

offense level of 6 for any losses exceeding $2,000.00, or an additional 14 levels according to the PSI in the case at bar.

[2] *See* Defendants' Sentencing Memorandum and Request for Downward Departure, DE 280, and Omnibus Objections to Presentence Investigation Reports And Notice of Request For Downward Departure with Incorporated Memorandum of Law, DE 279.

> But I'll hear argument now from defense counsel regarding the renewed motion for acquittal. I'm not sure that I'm going to decide that today. But I wanted you to know in advance how I felt about sentencing. If I find that there is a violation and Mr. Gupta has been convicted, it will not be a sentence of incarceration but a sentence of probation.

4. While this Court took the issues under advisement, the Eleventh Circuit issued a controlling decision in *United States v. Whiteside,* 285 F.3d 1345 (11th Cir. 2002), reversing a false statement conviction in a health care fraud prosecution because the government failed to prove that the defendant's interpretation of an ambiguous Medicare regulation was unreasonable. *Id.* at 1353.

5. On October 16, 2002, this Court granted post-verdict judgments of acquittal, citing the controlling *Whiteside* precedent and emphasizing in its detailed order of acquittal the ambiguity of the term "related party." The Court held that:

> Based on a thorough research and analysis of the trial record, the pleadings, and the applicable case law, the Court is now convinced that the trial evidence was insufficient to sustain the convictions – that, viewing the evidence in the light most favorable to the government, a reasonable trier of fact could not find guilt beyond a reasonable doubt.

6. The government appealed the Order and, on March 29, 2004, the Eleventh Circuit Court of Appeals held that the Court lacked jurisdiction to entertain the post-verdict motions because they were not timely filed. *United States v. Gupta,* 363 F.3d 1169, 1174 (11th Cir.

2004). Accordingly, the Court of Appeals vacated the acquittal order, reinstated the jury's verdicts, and remanded for sentencing. *Id.* at 1177.

7. The Panel, however, rejected the government's argument that the case should be reassigned to a different judge on remand, stating that it saw "no indication that the experienced district judge who tried this case would have any problem following the mandate of this Court, or that the appearance of justice would be disserved by allowing him to continue to preside over this case." *Id.* Moreover, the Panel rejected the government's complaint that "a supposedly too-light sentence" would be "preordained."

> We disagree. First, it seems strange to claim that the trial judge is likely to rule in an ominously predictable manner when he has already demonstrated his willingness to reconsider his previous rulings. Second, even if the judge were to impose the same sentence he suggested he would give in the previous sentencing hearing, there is no reason to doubt his judgment or impartiality. Consistency in the pursuit of justice is no vice. Moreover, an appeal of any sentence imposed is a possibility under 18 U.S.C. § 3742, should the government or the defendants have grounds.

8. The Defendant has announced they intend to appeal the Final Judgment to review the merits of the legal issues. In light of this appeal, this Court reaffirms its ruling that the Defendant is entitled to judgment of acquittal as a matter of law, for the reasons announced in its prior order. The Court now turns to the sentencing issue.

II.
SENTENCING FINDINGS

9. As noted above, this Court did not impose sentence at the January 26, 2001 hearing, it did hear argument and make findings regarding what sentences would be imposed if it decided to uphold the jury's verdicts.

10. After hearing argument on the hotly disputed issue of the "loss" or "damages" the Court as to Defendant Gupta stated:

> I'm going to find, based on the evidence in this case, that the government has not sustained any damages, and insofar as the PSI's are concerned, any increase for the amount of damages will be eliminated.

The Court then considered whether to impose a 4 level upward adjustment based on "organizer or leader in a criminal activity that involved five or more participants or was otherwise extensive" pursuant to U.S.S.G. §3B1.1(a) and a 2 level upward adjustment based upon "more than minimal planning" pursuant to U.S.S.G. §2F1.1(b)(2)(A). The Court rejected the first adjustment, but imposed the second:

> THE COURT: All Right. I'm going to, I'm not going to allow the four point enhancement for the extensive nature. It may have extended across the country but it was a very simple thing with regard to whether you check off the, whether it is a related company.
>
> Now, with regard to more than minimal planning. If there is a violation, I would say there's more than minimal planning. So I would certainly keep

> that two-point enhancement. What does that leave us with, six plus two equals eight –
>
> PROBATION OFFICER: Yes, your Honor.
>
> * * * * *
>
> But let me just, to save a lot of time – I know some of you were concerned – we're not going to be able to complete this in three hours, this sentencing. As you can see I have some clear ideas of my own.
>
> If Mr. Gupta is to be sentenced it will be at al level eight, and I would put him on probation. Just so you understand that.

Upon consideration of the evidence, the Court today imposes a sentence of probation upon Defendant Mahendra Pratap Gupta.

III.
UNITED STATES V. BLAKELY ISSUES

11. The constitutionality of the federal sentencing guidelines and nearly a dozen state sentencing guidelines schemes were seriously called into question June 24, 2004, with the Supreme Court's decision in *Blakely v. Washington*. In that case, a closely divided Court, following the line of *Apprendi v. New Jersey,* 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and its progeny, held that no sentence in a criminal case can be enhanced beyond the statutory maximum for an offense unless the fact is found by a jury or the defendant waives the jury (or pleads guilty to it).

12. Because of the confusion caused by Blakely and the importance of the issue, the United States Supreme Court granted certiorari in two cases and held oral argument on

October 4, 2004.[3] In the meantime, on September 2, 2004, the Eleventh Circuit held in *United States v. Reese,* 382 F.3d 1308 (11th Cir. 2004), that "district courts should continue to sentence pursuant to the Guidelines until such time as the Supreme Court rules on this issue." *Id.* at 1312. However, the opinion advised:

> We acknowledge that two circuits have held that Blakely does apply to the Guidelines, and that it is very difficult to predict whether the Supreme Court will apply Blakely to the Guidelines, and, if it does, whether it will hold that the Guidelines fall in their entirety or only in part. In light of this instability, we recognize that district courts might deem it wise and appropriate to take protective steps in case the Guidelines are later found unconstitutional in whole or in part. However, we are reluctant to provide specific advice with respect to what protective steps, if any, might be appropriate to reduce confusion and protect against duplicative judicial efforts should the Supreme Court so rule. We realize that such appropriate and feasible steps might vary with each individual case.

13. On reflection, the Court believes that however *Booker* and *Fanfan* are decided, the *Blakely* issue should have little or no impact on the sentencing in this case, since this Court has rejected the two major sentencing enhancements which would be subject to reversal if the guidelines are found unconstitutional.

---

[3] *See United States v. Booker*, ___ U.S. ___, ___ S.Ct. ___, 2004 WL 1713654 (U.S. Aug.2, 2004) and *United States v. Fanfan*, ___ U.S. ___, ___ S.Ct. ___, 2004 WL 1713655 (U.S. Aug.2, 2004).

14. While the two level enhancement for "more than minimal planning" pursuant to U.S.S.G. §2F1.1(b)(2)(A) might be disallowed if the guidelines were held unconstitutional, that enhancement – which raised Mr. Gupta from a level 6 to a level 8 – does not affect the ultimate sentence announced by the Court, so any error would be harmless.[4] However, it would be prudent for the Court to announce, as an alternate sentence, that if the Guidelines are deemed invalid, the Court would reach the same sentencing result utilizing the Guidelines as guidance in the exercise of its inherent sentencing discretion. In light of the substantial legal issues presented in this case, the Court further finds and holds that the Defendant's sentence should be stayed pending outcome of the appeal.

DONE and ORDERED in West Palm Beach, Florida this 8 day of November, 2004.

/s/ Kenneth Ryskamp
KENNETH RYSKAMP
UNITED STATES
DISTRICT JUDGE

[4] The Court disagrees with the government's argument that the verdict "reflects" both the minimal planning and organizer enhancements. *See* government's Sentencing Memorandum, pp. 5-6.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-16091-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

versus

MAHENDRA PRATAP GUPTA,
CARDINAL CARE, INC,
MARSHAL MEDICAL SERVICES,. INC.,
ATLANTIC HEALTH CARE SERVICES, INC.,
WEST COAST HEALTHCARE SERVICES, INC.
TREASURE COAST HEALTH CARE SERVICES, INC.,

Defendants-Appellants,
Cross-Appellees,

EDWARD J. QUINLAN, et al.,

Defendants.

.....

On Appeal from the United States District Court
for the Southern District of Florida

.....

(Filed Jan. 17, 2007)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: ANDERSON, FAY and SILER, *Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
UNITED STATES CIRCUIT JUDGE

---

* Honorable Eugene E. Siler, Jr., Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

42 C.F.R. § 413.17 Cost to related organizations.

(a) Principle. Except as provided in paragraph (d) of this section costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization. However, such cost must not exceed the price of comparable services, facilities, or supplies that could be purchased elsewhere.

(b) Definitions –

(1) Related to the provider. Related to the provider means that the provider to a significant extent is associated or affiliated with or has control of or is controlled by the organization furnishing the services, facilities, or supplies.

(2) Common ownership. Common ownership exists if an individual or individuals possess significant ownership or equity in the provider and the institution or organization serving the provider.

(3) Control. Control exists if an individual or an organization has the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization or institution.

(c) Application.

(1) Individuals and organizations associate with others for various reasons and by various means. Some deem it appropriate to do so to assure a steady flow of supplies or services, to reduce competition, to gain a tax advantage, to extend influence, and for other reasons. These goals may be accomplished by means of ownership

or control, by financial assistance, by management assistance, and other ways.

(2) If the provider obtains items of services, facilities, or supplies from an organization, even though it is a separate legal entity, and the organization is owned or controlled by the owner(s) of the provider, in effect the items are obtained from itself. An example would be a corporation building a hospital or a nursing home and then leasing it to another corporation controlled by the owner. Therefore, reimbursable cost should include the costs for these items at the cost to the supplying organization. However, if the price in the open market for comparable services, facilities, or supplies is lower than the cost to the supplier, the allowable cost to the provider may not exceed the market price.

(d) Exception.

(1) An exception is provided to this general principle if the provider demonstrates by convincing evidence to the satisfaction of the fiscal intermediary (or, if the provider has not nominated a fiscal intermediary, CMS), that

(i) The supplying organization is a bona fide separate organization;

(ii) A substantial part of its business activity of the type carried on with the provider is transacted with others than the provider and organizations related to the supplier by common ownership or control and there is an open, competitive market for the type of services, facilities, or supplies furnished by the organization;

(iii) The services, facilities, or supplies are those that commonly are obtained by institutions such

as the provider from other organizations and are not a basic element of patient care ordinarily furnished directly to patients by such institutions; and

(iv) The charge to the provider is in line with the charge for such services, facilities, or supplies in the open market and no more than the charge made under comparable circumstances to others by the organization for such services, facilities, or supplies.

(2) In such cases, the charge by the supplier to the provider for such services, facilities, or supplies is allowable as cost.